Supreme Court, U.S.
FILED
MAY 10 1993
OFFICE OF THE CLERK

No. 92-1607

In the Supreme Court of the United States

OCTOBER TERM, 1992

GENERAL MOTORS CORPORATION, PETITIONER

v.

JOANN DRENNAN, ET AL., RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF FOR THE PETITIONER

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In our petition, we explained that the Sixth Circuit has imposed a duty on employers to disclose to employees that they are considering possible changes to an ERISA welfare benefit plan. This duty is unsupported by Congress' statutory scheme, is at odds with the common law principles ERISA incorporates, and is misguided as a matter of policy. The Sixth Circuit's aberrant rule will have grave practical consequences for both employers and employees, as well as for the collective bargaining process. It is thus not surprising that every other court of appeals to consider the issue has rejected the duty of disclosure imposed by the Sixth Circuit here.

Respondents do not even attempt to refute our argument that the Sixth Circuit's disclosure rule is inconsistent with ERISA and unsound as a matter of policy. Moreover, respondents concede that no other court of appeals has imposed such a duty of disclosure. Instead, respondents argue that review is not warranted here because the Sixth Circuit did *not* impose any duty of disclosure; this case, respondents claim, really involves "misrepresentations."

There are several problems with respondents' attempt to avoid the clear holding of the court of appeals. First, respondents simply ignore the Sixth Circuit's unequivocal statement that GM had "a fiduciary duty to keep [employees] abreast of [management's] consideration" of possible benefit plan changes (Pet. App. 14a) -- *i.e.*, *a duty of disclosure*. Second, characterizing GM's conduct as "misrepresentations" does not change the essence of the court of appeals' ruling that GM breached its fiduciary duty simply by not informing employees that local plant managers were still considering the VTEP issue. The district court expressly rejected the notion that GM made any affirmative misstatements of fact to its employees, and the court of appeals' opinion does not identify any misstatement that would provide a basis to question the district court's conclusion, much less to reject it as clear error.

1. The plain language of the court of appeals' opinion refutes respondents' contention that the Sixth Circuit did not impose a duty of disclosure on employers under ERISA. The court of appeals (correctly) characterized the district court's "conclusion" as placing "GM * * * under an ERISA fiduciary *duty to disclose* its considerations" about whether to offer VTEP. Pet. App. 11a (emphasis added). The court of appeals went on to state that an employer has a duty under ERISA to "*disclose[] the progress* of its serious considerations to make a plan available to affected employees." Pet. App. 13a (emphasis added), citing *Berlin* v. *Michigan Bell Telephone Co.*, 858 F.2d 1154, 1164 (6th Cir. 1988). The

court concluded that "GM was impressed with a fiduciary *duty to keep [employees] abreast* of its consideration" of VTEP. Pet. App. 14a (emphasis added). Although respondents devote 12 pages of their brief to an attempt to convince this Court that the Sixth Circuit has not created a duty of disclosure, Br. in Opp. 11-16, 19-24, not once in those pages do respondents even mention, much less try to explain, the three critical statements from the court of appeals' opinion quoted above.

The district court's opinion provides respondents no more support. After confirming that "GM did not make any truly false statements without the benefit of hindsight," the district court went on to give the basis for its conclusion that GM nevertheless "misled" respondents: GM dealt with the plaintiff class unfairly "*by not disclosing* that a VTEP-type plan would be offered or even that the local management was pursuing such a plan." Pet. App. 33a. The district court held that "GM should have * * * mentioned the progress and efforts of the local management * * *." *Ibid.* Thus, the district court's sole basis for concluding that anyone was misled by GM's comments was that GM did not disclose fully the efforts of its local management to bring VTEP to Norwood.[1] The court of appeals not only affirmed the district court's result, but explicitly endorsed its "conclusion" that "GM was under an ERISA fiduciary duty to disclose" the efforts of local Norwood officials to extend VTEP to Norwood employees. Pet. App. 11a.[2]

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[1] Respondents state (Br. in Opp. 14 n.1) that GM's description of the key passage of the district court's opinion "conveniently omits" what respondents refer to as the "context" of the statement. But the petition quoted the relevant sentence of the district court's opinion virtually in full, omitting only the words "of the Norwood plant." See Pet. 6, Pet. App. 33a.

[2] Contrary to respondents' repeated assertions (Br. in Opp. 16, 18 (continued...)

2. In an effort to make the case seem fact-bound, respondents devote 11 pages of their brief to an elaborate recitation of the history of the case. Br. in Opp. 1-11. The lengthy statement, however, does not contradict the facts as presented in our petition. On the contrary, it confirms the repeated efforts of local GM officials to obtain VTEP for Norwood, and it equally confirms senior GM officials' repeated rejection of those requests. Br. in Opp. 5-11. Respondents even acknowledge that during the time period in question, VTEP would indeed "have seemed dead in the water." Br. in Opp. 8.

Respondents nevertheless persist in asserting that GM made "misrepresentations" to its employees. They base this claim on an allegation that "GM representatives specifically stated that VTEP would never be made available to Norwood employees." Br. in Opp. 12. Respondents' assertion, however, is both factually false and legally untenable.

First, although respondents assert 13 times in a 28 page brief that GM told employees that VTEP would "never" be offered,[3] their citations to the record do not support the assertion. As the district court held, GM simply told

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[2] (...continued)
& n.4, 22 n.6), GM did not "choose" to discuss VTEP. As the testimony quoted in respondents' brief shows, GM representatives only unwillingly discussed VTEP, and "[o]nly when asked questions about it." Testimony of Joann Drennan, TR Day 2 at 100, quoted in Br. in Opp. at 13. Nor could GM have escaped liability under the rule created by the court of appeals by simply refusing to answer. See Br. in Opp. 18 n.4. "A fiduciary must give *complete and accurate* information in response to participants' questions" (Pet. App. 13a (emphasis added)). Respondents' insinuations that GM's troubles were somehow the product of garrulous representatives are therefore unwarranted.

[3] Br. in Opp. 2, 4, 12 (twice), 13, 14, 16, 20 (three times), 23 (twice), 24.

employees that VTEP "was not available" and was not an option at Norwood. Pet. App. 27a. Those statements were unquestionably correct at the time they were made. At none of the transcript pages cited by respondents did any witness use (or affirmatively respond to a question using) the word "never."[4] The only exchange involving the word "never" on any of the pages respondents cite, in fact, was between plaintiffs' and defendant's counsel, in which Mr. Kelly, counsel for plaintiffs, admitted that his witness had *not* used the word "never" in his testimony. TR Day 2 at 76.[5]

Second, even if GM had stated in September 1987 that VTEP would "never" be offered at Norwood, such a statement would not constitute a misrepresentation. "A misrepresentation is an assertion that is not in accord with the facts." RESTATEMENT (SECOND) OF CONTRACTS § 159 (1981). See also RESTATEMENT (SECOND) OF TORTS § 525 comment b (1977) ("[W]ords or conduct asserting the existence of a fact constitute a misrepresentation if the fact does not exist."). GM made no assertions not in accord with

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[4] Respondents also seek to ascribe to the district court a finding that GM told its employees that VTEP would "never" be available. Br. in Opp. 4, 12, 19-20. The word "never" does not appear in the district court's opinion. The relevant finding of fact in the district court's opinion states that GM and the UAW provided employees with the information that VTEP "was not available." Pet. App. 27a.

[5] The witnesses on whose testimony respondents rely did testify that GM stated that VTEP was "absolutely not available for the Norwood plant" (Testimony of Jerry Allen, TR Day 2 at 63), that the SUB Buyout "was the best buy-out we were going to get. There was nothing else available to us" (*id.* at 64), and that "we did not qualify for * * * the VTEP buyout." *Id.* at 73. Again, each of these statements was concededly correct at the time it was made.

the facts: during the relevant time period, VTEP was *not* available to respondents.

Moreover, the statements attributed to GM would have been no more than a *prediction* about future events. Such a prediction does not rise to the level of a misrepresentation unless "the maker knows of [something] which will make the fulfillment of his prediction * * * impossible or improbable." *Id.* comment f. In light of senior GM officials' strong opposition to and repeated rejection of VTEP (see Br. in Opp. 6-8), as well as the need for union approval (which ultimately proved to be another major sticking point, see Pet. 5, Pet. App. 28a), at the time local officials stated that VTEP would not be available at Norwood such a prediction was anything but "impossible or improbable." Cf. Br. in Opp. 8 ("[T]he issue * * * whether VTEP would be made available may have seemed dead in the water * * *.").

Plainly, GM's *failure to disclose* the persistent but at the time seemingly fruitless efforts of local management to obtain VTEP for the Norwood workers is the sole basis for the court of appeals' unsupported statement (Pet. App. 9a) that GM made "misrepresentations." Non-disclosure, however, does not amount to a misrepresentation unless the non-disclosing party is under some independent *duty to disclose*. See generally RESTATEMENT (SECOND) OF CONTRACTS § 161. And although respondents devote much of their brief to arguing that GM's "consideration" of VTEP gave rise to such a fiduciary duty under ERISA (see Br. in Opp. 12, 21-24 & n.6), that question goes to the merits, and is in fact the precise question that we have asked this Court to review. See Pet. i.

3. The only support offered for respondents' statement that the opinion below does not conflict with the opinions of other courts of appeals is that those cases did not involve "misrepresentations." Br. in Opp. 25-27 & n.9. We have explained above that this case also does not involve any

misrepresentations; thus, our showing of a conflict among the circuits stands unrebutted. Moreover, a review of the facts of the cases in question establishes that what respondents and the Sixth Circuit have labelled a "misrepresentation" is no different from what other circuits have viewed as refusals to disclose that are perfectly permissible because the employers were under no ERISA duty of disclosure.

In *Payonk* v. *HMW Industries, Inc.*, 883 F.2d 221 (3d Cir. 1989), for example, employees "rolled over" their assets from the HMW pension plan to a new plan at the urging of their employers. *Id.* at 222-224. At the same time, HMW was considering whether to terminate the HMW plan. When the plan was terminated shortly thereafter, its surplus assets were distributed to the remaining participants. Because they had "rolled over" their HMW plan assets into new plans, the plaintiffs did not share in the distribution. *Ibid.*

The *Payonk* plaintiffs claimed that, had they known that HMW was seriously considering terminating the plan, they would have postponed their departure until after they had shared in the surplus. 883 F.2d at 226. That claim is indistinguishable from respondents' assertions that, had they known that local GM officials were still considering VTEP, they would not have elected the SUB Buyout. However, while the Third Circuit in *Payonk* recognized that "[u]ntil the termination decision became final * * * disclosure was not required," *id.* at 227, the Sixth Circuit in this case held that the same lack of disclosure amounted to a misrepresentation and a violation of fiduciary duty under ERISA. The cases are thus in irreconcilable conflict.[6]

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[6] Respondents' attempt to distinguish *Stanton* v. *Gulf Oil Corp.*, 792 F.2d 432 (4th Cir. 1986), is similarly lacking in merit. Respondents rely on the fact that the Fourth Circuit found that Gulf's failure to disclose did not amount to a misrepresentation. Br. in Opp. 27 n.9. That is precisely the point: in this case the (continued...)

4. Respondents cannot dispel the clear fact that in light of the court of appeals' holding, employers in the Sixth Circuit have a duty to disclose to employees that they are seriously considering changes to an ERISA plan. That duty remains, whether we call it a duty of disclosure or a duty to avoid misrepresentations. As we demonstrate in the petition, the Sixth Circuit's disclosure rule is inconsistent with the provisions of ERISA, is misguided as a matter of federal benefits policy, and is contrary to the law in other circuits. Review by this Court is essential to restore uniformity and sensible benefits regulation.

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[6] (...continued)
Sixth Circuit held that virtually identical conduct *did* constitute a misrepresentation. The evidence in *Stanton* showed that the plaintiff asked Gulf whether there were plans to change the company's retirement policy during the following year. The representative to whom Stanton spoke stated that he was aware of no such changes. In fact, the Gulf Oil Board of Directors had already approved changes to the company's retirement benefits; the changes were not implemented until after Stanton had retired. *Id.* at 433. The fact that the Fourth Circuit found that the company's representative's assurances did not constitute misrepresentations highlights the conflict between *Stanton* and the rule of disclosure imposed by the Sixth Circuit here.

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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